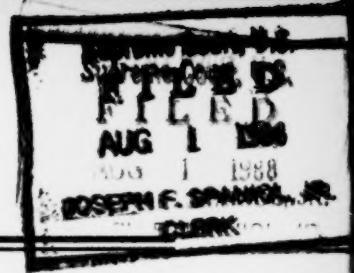


①  
88-204

No. \_\_\_\_\_



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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SCHIAVONE CONSTRUCTION CO.,  
a New Jersey Corporation,

*Petitioner,*

v.

TULIA MEROLA, as Administratrix of the Estate of Mario  
Merola; and the DISTRICT ATTORNEY FOR THE  
COUNTY OF THE BRONX, NEW YORK,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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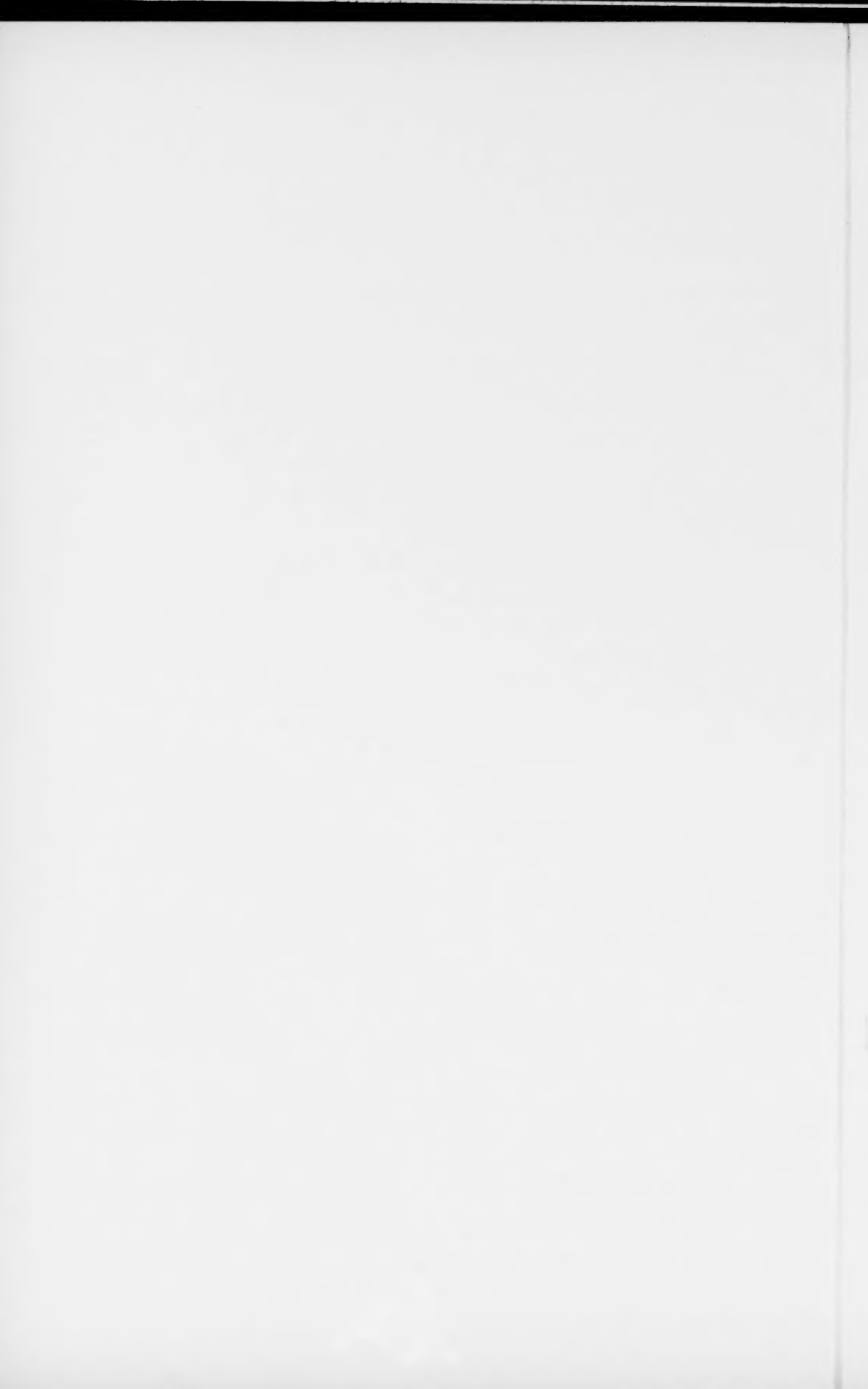
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*Counsel for Petitioner*

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**STATEMENT OF QUESTION PRESENTED**

Does acquittal of plaintiff in State Court criminal case preclude action under 42 U.S.C. §1983 against the State District Attorney for violations of plaintiff's right to due process and fair trial?



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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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The petitioner Schiavone Construction Co. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on June 9, 1988.

**OPINIONS BELOW**

The June 9, 1988 opinion of the United States Court of Appeals for the Second Circuit is reported at 848 F.2d 43 (2d Cir. 1988) and is reprinted in the appendix hereto, page A-12, *infra*.

The decision of the United States District Court for the Southern District of New York (Sand, D.J.) is reported at 678 F. Supp. 64 (S.D.N.Y. 1988), page A-14, *infra*.

## JURISDICTION

(i) Petitioner seeks review of the opinion of the United States Court of Appeals for the Second Circuit dated June 9, 1988; (ii) no order respecting a rehearing or extension of time in which to petition for certiorari has been sought; (iii) petitioner does not rely upon Rule 19.5; (iv) original jurisdiction was invoked on the basis of 42 U.S.C. §1983. Certiorari is sought pursuant to 28 U.S.C. §1254(1).

## STATUTE INVOLVED

42 U.S.C. §1983. *Civil action for deprivation of rights*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

On September 24, 1984 plaintiff, together with eleven others, was indicted by a Bronx County Grand Jury. The multi-count indictment alleged that each of the defendants acting in concert was guilty of grand larceny, preparing false business records and filing false instruments with the New York City Transit Authority. At the time of the Bronx indictment, Raymond J. Donovan, one of the accused and a major stockholder in the plaintiff corporation, held the post of United States Secretary of Labor.

Between that date and the commencement of the criminal trial in October 1986, the District Attorney for Bronx County, the late Mario Merola, made numerous public statements which were patently improper and clearly likely to materially prejudice Plaintiff-Petitioner in defense of the charges against it in the indictment, including statements made at a press conference widely covered on television newscasts on October 2, 1984 asserting the guilt of the accused, implying involvement in a homicide and the like, statements in the text accompanying a cover story for the *New York Daily News Magazine* expressing Merola's personal belief in the guilt of the defendants,<sup>1</sup> an interview by Mike Wallace on the nationally televised program "60 Minutes" in which he represented that FBI agents had been "called off" by "people in the White House" and ultimately (during jury selection) through the press spokesman for the Office of the District Attorney a press release report explaining that Merola had tried to keep the identity of certain prosecution witnesses confidential because the prosecution was "dealing with the Mafia in this case ...".

The conduct complained of is set forth in more detail in the Revised Second Amended Complaint which is reproduced commencing at page A-1, *infra* (exclusive of exhibits annexed thereto). That pleading constitutes the entire record in this matter since the trial court dismissed the Complaint pursuant to Fed.R.Civ.P. 12(b)(6) reported in 678 F.Supp. 64 (S.D.N.Y. 1988) reproduced at page A-14, *infra*, and this decision was affirmed by the Court of Appeals. *Schiavone Construction Co. v. Tulia Merola, as Administratrix of the Estate of Mario Merola; and the District Attorney for the County of the Bronx, New York*, 848 F.2d 43 (2d Cir. 1988), page A-12, *infra*.

The Per Curiam opinion in the Second Circuit to which Certiorari is sought consists of a single paragraph:

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<sup>1</sup> "Donovan has a staff of 15 lawyers, some of the best in the country. He also has a public-relations firm working in his behalf. The lawyers are throwing handfuls of darts in the form of motions at the federal and state courts. He just needs to have one stick. *Would an innocent guy need all that help?* (*Emphasis added.*)

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, J., dismissing plaintiff's complaint brought under 42 U.S.C. §1983 and holding that plaintiff's acquittal in the underlying criminal proceedings precluded recovery of the extra expenses borne by plaintiff in its efforts to neutralize defendant's prejudicial pretrial statements. The judgment of the district court is affirmed for the reasons given by Judge Sand in his opinion reported at 678 F. Supp. 64 (S.D.N.Y. 1988).

848 F.2d at 44, page A-13, *infra*.

## REASONS FOR GRANTING THE WRIT

### I.

The Second Circuit decision (and, perforce, the District Court decision) is directly in conflict with another Court of Appeals decision in a virtually identical case and yields an anomalous result.

"Of course, the improper statements of the prosecutor do not necessarily render impossible the selection of an impartial jury; yet, they should not be excused solely on the ground that it may be possible to secure a fair trial by a change of venue or the grant of a continuance, or both. Such measures are merely necessary compromises with due process, such as the Sixth Amendment right to be tried in the vicinage where the alleged offense has been committed and the right to a speedy trial. Moreover, such remedies for prejudicial public statements place an extra burden on those charged with crime and an additional expense for counsel, travel and delay. *To the extent that such expenses may be incurred by a criminal defendant in protecting against what a court determines to have been an infringement of his rights, we believe they should be recoverable in federal court in a suit under § 1983.* (Emphasis supplied)"

The foregoing quotation is from *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir. 1976), page A-25 — A-26, *infra*, the quintessential case in point since the issue presented was precisely the

same and indeed the wrongful conduct was committed by the very same District Attorney! We have reproduced that decision in its entirety in the appendix commencing at page A-19 for convenient reference.

It is at once manifest that both the trial court and Second Circuit decisions herein cannot possibly be reconciled with either the rationale or the result in *Martin v. Merola*.

The author of the majority<sup>2</sup> opinion in *Martin* was Judge Lumbard, formerly Chief Judge of the Second Circuit, with the concurrence of Judge Gibbons, currently Chief Judge of the Third Circuit, both of whom it must be acknowledged are juridical face cards. The Lumbard/Gibbons opinion relied in large part upon *Sheppard v. Maxwell*, 384 U.S. 333 (1966), where Mr. Justice Clark noted, in reversing a murder conviction, that,

unfair and prejudicial news comment on pending trials has become increasingly prevalent. ... Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. ... Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.

384 U.S. at 362-63.

The Lumbard/Gibbons opinion in *Martin* was the entire predicate for this case, expressing the view twelve years ago that:

We believe the time has come for prosecutors to realize that failure to conduct themselves within the law and in accordance with the constitutional rights

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<sup>2</sup> The separate statement of Judge Gurfein was not a dissenting opinion as may be seen by reading the entire decision.

of those accused of crime, and held to be innocent until proven guilty, may subject them to suit in a federal court for the damages caused by their disregard of the law.

532 F.2d at 198, page A-29 – A-30, *infra*.

It is of critical importance to note the following:

a. The defense herein has never claimed absolute prosecutorial immunity;<sup>3</sup>

b. The dismissal herein was under Fed.R.Civ.P. 12(b)(6) in which the standard is “not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Given the pellucid views expressed in *Martin*, the generous standards of Rule 12(b)(6), the conduct of the District Attorney which really is not and cannot be disputed,<sup>4</sup> the conclusion of the Second Circuit that the fact of acquittal “precludes” maintenance of a §1983 action is indeed anomalous.

Granting that the conflict exists between decisions of the same Circuit the result here is also at odds with the strain of decisions of this Court including *Sheppard v. Maxwell*, *supra*.

We further suggest that both the District Court and Second Circuit decisions in this case provoke the question whether the Judicial Branch has not unwittingly exceeded its powers. Section 1983 has been in place for more than a century and is cast in

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<sup>3</sup> The defense has at least nominally asserted “qualified immunity” as a defense but the District Court held that this assertion does not provide a basis for dismissal of the Complaint. 678 F.Supp. at 65-66, page A-15, *infra*.

<sup>4</sup> Conduct which the District Court characterizes as “highly reprehensible...”.

the most mandatory terms. Has the Judicial Branch the right to partially nullify this legislation so as to deprive plaintiff of rights secured by the Constitution and the laws of the United States where it has been *acquitted*, inferentially reserving such rights only to a plaintiff which has been *convicted*?

## II.

The issue presented has not been but should be settled by this Court since the federal question has been decided in conflict with the applicable decisions of this Court.

This case presents the Supreme Court with a rare opportunity to deal with a matter which has become increasingly important in direct proportion to technological advances in dissemination of information by the media. Justice Frankfurter in his concurring opinion in *Irvin v. Dowd*, 366 U.S. 717 (1961) took (we suspect) particular delight in the result which he had advocated nine years earlier in *Stroble v. California*, 343 U.S. 181 (1952) where he said:

Precisely because the feeling of the outside world cannot, with the utmost care, be kept wholly outside the courtroom every endeavor must be taken in a civilized trial to keep it outside. To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial, is to make the State itself through the prosecutor who wields its power a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice. Science with all its advances has not given us instruments for determining when the impact of such newspaper exploitation has spent itself or whether the powerful impression bound to be made by such inflaming articles as here preceded the trial can be dissipated in the mind of the average juror by the tame and often pedestrian proceedings in court.

343 U.S. at 201 (Frankfurter, J., dissenting).

In *Stroble* he was concerned with mere newspapers; in *Irvin* he spoke of minds "saturated by press and radio" and when fifteen years later Judges Lumbar and Gibbons spoke on the subject in *Martin v. Merola* they thought it appropriate to remark in footnote 4 that:

The increasing concern with the possible damaging effects of prosecutorial statements which go beyond permissible limits is surely due in large part to the fact that today universal access to television cameras charges the memories of the viewers more forcibly and indelibly than other means of mass communication. While there is no evidence of any television broadcast in this case, it is common knowledge that such matter is frequently broadcast on many stations.

532 F.2d at 197 n.4

There is not the slightest social warrant for the *ex cathedra* utterances of prosecutors concerning the guilt of those under indictment. We live and function in an era in which the sheer volume of information threatens knowledge. Publicity which naturally attends the fact of indictment and the subject matter of the charges visits a heavy burden upon the accused which must be borne in deference to the public right to know, but this is burden enough. Embroidery by the prosecutor upsets the delicate balance unfairly to the accused, and where a prosecutor comes out of the pocket of immunity he must accept the risk attendant thereto. No "floodgate" argument ought to be countenanced, for the control lies entirely in the hands of the prosecutor who, if he simply confines himself to the performance of his duties, will continue to be invulnerable to §1983 actions and will be the subject of precisely the amount and nature of publicity which the case warrants and his conduct deserves.

The decisions which we ask that this Court review at least countenance and as a practical matter sanction such "reprehensible" utterances by state prosecutors who may, if the result is allowed to stand, pollute the community with impunity and

intrude egregiously upon the right of the accused to due process secure in the knowledge that a civil rights remedy guaranteed by the Congress in §1983 is simply unavailable against him if the accused is acquitted! This is so even where (as here) it is undisputed that the accused was put to substantial extra burden and expense "to neutralize defendant's prejudicial pretrial statements." If the antidote works, one cannot complain about the poisoning.

We remind the reader that the defense does not assert the absolute immunity which is available to a state court prosecutor while acting within the scope of his prosecutorial function. Thus, the contents of the indictment, in-court utterances by the prosecutor on pretrial motions, in opening statements and summations are independently protected from serving as the basis for civil liability by virtue of such absolute immunity. As we approach the millennium the Supreme Court ought to at least consider whether the generous boundaries of such immunity ought not to be limited strictly to the proper prosecutorial role.

### CONCLUSION

The author of a Petition for Certiorari is all too keenly aware of the need for brevity if one is to have any chance to overcome the statistical odds against the Petitioner, and struggles painfully toward that end, sacrificing that which ought to be said, confining himself to what must be said. We have tried to sail safely between Scylla and Charybdis and we earnestly trust that we will not fail because we have said either too little or too much.

Respectfully submitted,

THEODORE W. GEISER

Roseland, New Jersey  
August, 1988



## **APPENDIX**



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

SCHIAVONE CONSTRUCTION CO.,  
a New Jersey Corporation;

Plaintiff,

vs.

MARIO MEROLA, individually and as  
District Attorney for the County of the Bronx,  
New York, New York;

Defendant.

---

84 Civ. 6462

(LBS)

REVISED  
SECOND  
AMENDED  
COMPLAINT

The plaintiff, Schiavone Construction Co., (hereinafter "SCC"), a corporation of the State of New Jersey having its principal offices at 1600 Paterson Plank Road, Secaucus, New Jersey complaining of the defendant Mario Merola herein says as follows:

FIRST COUNT

1. This Count of action is brought under the Civil Rights Act, 42 U.S.C. §1983; federal jurisdiction is properly predicated on 28 U.S.C. §§1331 & 1343 and the Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the United States Constitution.

2. Venue in this judicial district is founded upon 28 U.S.C. §1391(b) and (e) since the acts complained of occurred in this district.

3. For many years, the plaintiff, Schiavone Construction Co. ("SCC"), a New Jersey corporation, has been engaged in the heavy construction business, primarily in the New York metropolitan area.

4. At all times relevant hereto the defendant Mario Merola ("Merola") was the District Attorney for the County of Bronx, New York, New York.

5. At all times relevant hereto the defendant Merola was acting under color of the laws of the State of New York.

6. SCC was the sponsor and managing partner of Schiavone Construction Co., Impresit Girola Lodigiani, Inc. and Thomas Crimmins Contracting Co., a joint venture ("SIC") formed in or about October, 1975 for the purpose of submitting a successful bid to the New York City Transit Authority (hereinafter "TA") for construction of part of a rapid transit railroad known as Route 131A, Section 5A ("Section 5A").

7. SIC began work on the Section 5A phase of the TA project in or about March, 1976. As a result of SIC's lowest competitive bid in August of 1978, SIC's work for the TA was subsequently expanded to include a contiguous section known as Route 131A, Section 5B (hereinafter "Section 5B"); on or about September 8, 1978 the Section 5B unit price contract was executed for a price of approximately \$186,000,000.00.

8. On September 24, 1984, six years after execution of the 5B contract and substantial completion of the 5B contract, the plaintiff, together with ten (10) others, including other personnel of SCC, were indicted by a Bronx County grand jury. The multi-count indictment alleged that each of the defendants acting in concert were guilty of grand larceny, preparing false business records and filing false instruments with the TA. Said Bronx indictment was not made public until October 1, 1984, shortly before the national election. At the time of the Bronx indictment Raymond J. Donovan, a Bronx indictee and major stockholder in SCC, held the post of U.S. Secretary of Labor in President Ronald Reagan's Cabinet.

9. It is axiomatic that a prosecutor has a duty, not to convict, but to seek justice. In his relations with the press it is incumbent upon him to insure that an accused is not deprived of a fair trial. (New York State Bar Association Committee on Professional Ethics Opinion #298, June 25, 1973).

10. The ABA Code of Professional Responsibility, Disciplinary Rule 7-107(B), provides:

"... (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that related to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) *Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.*" (emphasis added).

11. The American Bar Association Standard 3-1.3, relating to Public Statements, provides:

....The prosecutor should not exploit the office by means of personal publicity connected with a case before trial, during trial, or thereafter.

12. On October 2, 1984 the defendant Merola conducted a press conference with respect to the indictment and during the course of said press conference he made numerous statements which were patently improper and which clearly were likely to materially prejudice the plaintiff in defense of the charges against it in the Bronx indictment. A copy of the transcript of this press conference is annexed hereto as Exhibit "A".

13. In the course of the aforesaid Merola press conference of October 2nd, the defendant Merola made the following false and prejudicial statements, among others:

A) The "Schiavone people" filed with the TA "false documents" "falsified records" so as to elicit "reimbursement" from the TA for expenses that, in fact, were not incurred;

B) Jopel a subcontractor of SIC on the 5B job and a defendant in the action, did not receive from SCC the value ascribed by SCC in Jopel's subcontract work;

C) The "Jopel contract...was for an amount of something like \$18 million";

D) The "extent of the fraud perpetrated on the TA was in the vicinity of \$8 million";

E) Suggested that there was criminality involved in connection with an interest free SCC loan of \$200,00 to Jopel in March of 1979;

F) SCC and its officers and stockholders "embarked upon this scheme of inflating their expenses...";

G) The inditees, including plaintiff, could possibly end up paying a fine of "something like \$16 million";

H) "[T]hose people who were involved in the homicide, the Buonos and Massellis, the Salvatore Frascones, had a financial interest in doing business with the Schiavone's. Let's make that very clear";

I) "Mr. Donovan was the beneficiary ...of all the skulduggery and the monies.";

J) Raymond Donovan and "all of his employees and all of his officers" took part in illegal activity;

K) Raymond Donovan "his corporation and all of this officers" took part in a scheme to steal over \$8 million dollars;

L) The Silverman Grand Jury did not have access to the TUM-CON tapes;

M) "[The TA] was defrauded in the sense that bills were altered. The fraudulent bills were altered by them indicating that payments were made by Schiavone to Jopel which in fact were never made. And the TA ... in effect reimbursed Schiavone. So that Schiavone in effect got more money than it allegedly paid out."

N) "Jopel ... got this \$18 million in total contract and we're saying that of the \$18 million they did not receive \$8 million of it."

14. By reason of October 2nd press conference, SCC, in an effort to protect and preserve its right to a fair trial, retained a public relations firm in an effort to neutralize, so far as possible, the heavy adverse publicity directly caused by defendant Merola's improper statements.

15. SCC's substantial expense associated with its retention of a public relations firm was the direct and proximate result of defendant Merola's knowing infringement of SCC's constitutional rights in the Bronx criminal proceedings.

16. The plaintiff filed an unsuccessful motion in the Bronx action wherein, in part, it sought a dismissal of the indictment based on defendant Merola's press conference of October 2, 1984; that application was denied in a written opinion of the court dated March 14, 1985.

17. On March 31, 1985, a picture of defendant Merola was on the cover of "Daily News Magazine" with the description: "Mario

Merola, Runaway D.A." (Exhibit "B" hereto). Page 2 of the magazine contains a brief profile of defendant Merola including a reference to his alleged "reputation for shooting from the lip ...."

18. The aforesaid Daily News Magazine story entitled "Macho Merola, The Bronx's Fighting D.A." quotes defendant Merola expressing his personal belief in the guilt of the defendants in the Bronx criminal action:

Donovan has a staff of 15 lawyers, some of the best in the country. He also has a public-relations firm working in his behalf. The lawyers are throwing handfuls of darts in the form of motions at the federal and state courts. He just needs to have one stick. *Would an innocent guy need all that help?* (Exhibit "B", pg. 7, col. 3, para. 2; Emphasis added).

19. In point of fact, there were twelve (12) defendants in the Bronx criminal action who were *required* by the court to be represented by separate legal counsel so as to avoid any conflict of interests.

20. In the April 25, 1985 issue of the New York Law Journal, at Page 1, the Disciplinary Committee of the First Judicial Department, in which the Bronx prosecution was pending, issued a statement cautioning all lawyers to comply with Disciplinary Rule 7-107, noting the "recent proliferation of lawyer's discussions through the media of cases pending in the courts."

21. On May 7, 1985, as a consequence of a defense motion to censure defendant Merola for prior derelictions, the Bronx Court authored an opinion which adopted verbatim, as an order of the court, the aforesaid Disciplinary Rule 7-107 of the Code of Professional Responsibility, which precluded all counsel, including defendant Merola, from making any extrajudicial statements that might reasonably be expected to be disseminated to the public which expressed "any opinion as to the guilt or innocence of the accused...." or "which would constitute a 'clear and present danger' to the administration of justice in this case."

22. On November 3, 1985, Mike Wallace interviewed the defendant Merola, among others, on the nationally televised news program "*60 Minutes*" and during the course of that interview, part of a segment entitled "The Donovan File", the defendant Merola stated that the failure of the Justice Department to prosecute SCC was "political in the sense that, if they went ahead, it would have implicated the possible Secretary of Labor...." He further represented that the FBI agents had been "called off" by "people in the White House." (Exhibit "C").

23. In essence the defendant Merola, once again, advised the millions of viewers of the "*60 Minutes*" broadcast that all of the defendants in the Bronx criminal action, including plaintiff, were guilty as charged and his prosecution was necessitated by a purported political cover-up involving unnamed White House personnel.

24. Given the show's focus, the FBI's investigation of Donovan during his nomination and confirmation as U.S. Secretary of Labor, there was no conceivable justification for the defendant Merola's appearance on the "*60 Minutes*" broadcast. The Bronx indictment had issued more than a year earlier.

25. Each of the cited statements made by the defendant Merola to the press media was totally improper, false and prejudicial to the constitutional rights of plaintiffs in the Bronx criminal proceedings.

26. The challenged Merola statements were in each instance made under circumstances such as to have them circulated prominently in the media. There was continuous and widespread interest in what had come to be called "the Donovan case" and the defendant Merola deliberately fed the media's thirst for comment on the proceedings with full knowledge of the resultant detriment to all the defendants therein, including the plaintiff.

27. The nexus between the challenged Merola statements and the then pending Bronx criminal proceedings is undisputed in that they are not vague generalized observations on the law or the legal system but, instead, are remarks narrowly directed at

the defendants in the Bronx prosecution. This clear nexus rendered the potential for prejudice to a fair trial unmistakable.

28. There was no reasonable need or excuse for the cited Merola statements during the pendency of the Bronx criminal proceeding. The clear purposes of such conduct were to: (a) promote the defendant Merola's public image; and (b) induce others, including potential Bronx jurors, to believe that the plaintiff and the other defendants in the Bronx prosecution were guilty of the crimes charged.

29. The defendant Merola's persistent failure to conduct himself within the bounds of the law and in accordance with the plaintiff's constitutional rights harmed the plaintiff in the sense that its right to a fair trial in the Bronx prosecution was infringed upon.

30. The plaintiffs have a constitutional right to have a prosecutor, such as defendant Merola, refrain from making any statements which might tend to prejudice their obtaining a fair trial.

31. The aforesaid Merola statements were: (a) made in bad faith; (b) manifestly beyond the proper exercise of his authority and the power of his office; and (c) violative of the plaintiffs' 4th, 5th, 6th, 8th, 13th and 14th amendment rights. Such conduct constitutes a clear deprivation of plaintiffs' rights, privileges or immunities and, as such, is actionable under 42 U.S.C. §1983.

32. The cloak of immunity which shrouds certain activities of a prosecutor is unavailable to defendant Merola in this instance because: the defendant Merola acted in bad faith; the challenged Merola conduct is clearly beyond the scope of his official duties; Merola knew or reasonably should have known that his challenged actions would deprive plaintiff of its constitutionally protected rights; and Merola's challenged conduct could not be justified under any set of circumstances, facts or assumptions.

33. Jury selection in the Donovan case commenced in September, 1986 and, during that process, the defendant Merola's

press spokesman, Edward McCarthy, give a press release, reported in September 10, 1986 issue of "Newsday", wherein he stated that defendant Merola had tried to keep the identity of certain prosecution witnesses confidential because the prosecution was "dealing with the Mafia in this case. . . ." (See Exhibit "D" attached hereto.)

34. On Memorial Day, May 25, 1986, the Bronx criminal prosecution was concluded with the jury finding the plaintiff SCC and all SCC personnel on trial not guilty on all counts.

35. Although the plaintiff SCC was ultimately acquitted of all charges in the Bronx prosecution. SCC was confronted with a jury pool that had to be scrutinized for taint caused by the Merola statements to the news media. Potential jurors were questioned as to their knowledge of the case and some were dismissed due to their admitted awareness of the case derived from media reports. Undoubtedly, the Bronx jury selection process was more protracted and difficult for the plaintiff SCC than it would have been were it not for the impermissible Merola media statements. The plaintiff SCC should not have been subjected to such infringement of its rights in the vitally-important jury-selection process; nor should the plaintiff SCC have had its subsequent trial strategies take into consideration the potential that one or more sitting jurors may have been subconsciously prejudiced against them by the Merola media statements.

WHEREFORE, plaintiff Schiavone Construction Company prays that:

(A) This Court enter judgment in plaintiff's favor and against the defendant Mario Merola awarding the plaintiff compensatory and punitive damages plus interest, cost of suit and, pursuant to 42 U.S.C. §1988, counsel fees; and

(B) This Court award plaintiff such other and further relief as may be in conformity with equity and good conscience and to this Court may seem just.

CONNELL, FOLEY & GEISER, ESQS.  
Attorneys for Plaintiff  
Schiavone Construction Co.

BY: \_\_\_\_\_  
THEODORE W. GEISER, ESQ.

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BY: \_\_\_\_\_  
JACK KAPLAN, ESQ.

DATED:

**DEMAND FOR JURY**

Plaintiff hereby demands a trial by jury as to all issues.

**CONNELL, FOLEY & GEISER, ESQS.**  
Attorneys for Plaintiff  
Schiavone Construction Co.

BY: /s/ Theodore W. Geiser  
\_\_\_\_\_  
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BY: /s/ Jack Kaplan  
\_\_\_\_\_  
JACK KAPLAN, ESQ.

DATED: 7/30/87

UNITED STATES COURT OF APPEALS

For the Second Circuit

- - - - -

No. 1190 August Term 1987  
Argued: May 27, 1988 Decided: June 9, 1988  
Docket No. 88-7162

-----X  
SCHIAVONE CONSTRUCTION CO., a New Jersey  
Corporation,

Plaintiff-Appellant,

- against -

TULIA MEROLA, as Administratrix of the Estate of  
Mario Merola; and the DISTRICT ATTORNEY FOR  
THE COUNTY OF THE BRONX, NEW YORK,

Defendants-Appellees.

-----X  
Before: FEINBERG, Chief Judge, NEWMAN and PRATT,  
Circuit Judges.

Appeal from judgment of the United States District Court for  
the Southern District of New York, Leonard B. Sand, J., dismissing  
plaintiff's complaint pursuant to 42 U.S.C. § 1983 and holding  
that plaintiff's acquittal in underlying criminal proceedings  
precluded recovery for additional expenses incurred by plaintiff  
in its efforts to neutralize prejudicial pretrial publicity.

Judgment affirmed.

THEODORE W. GEISER, Roseland, NJ,  
for Plaintiff-Appellant,

ALAN G. KRAMS, New York, NY,  
Assistant Corporation Counsel (Peter  
L. Zimroth, Corporation Counsel,  
Leonard Koerner, Fay Leoussis,  
Assistant Corporation Counsels, of  
Counsel), for Defendants-Appellees.

PER CURIAM:

Plaintiff appeals from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, J., dismissing plaintiff's complaint brought under 42 U.S.C. § 1983 and holding that plaintiff's acquittal in the underlying criminal proceedings precluded recovery of the extra expenses borne by plaintiff in its efforts to neutralize defendant's prejudicial pretrial statements. The judgment of the district court is affirmed for the reasons given by Judge Sand in his opinion reported at 678 F. Supp. 64 (S.D.N.Y. 1988).

**SCHIAVONE CONSTRUCTION CO., a New Jersey  
Corporation, Plaintiff,**

**v.**

**Mario MEROLA, Individually and as District Attorney for the  
County of Bronx, New York, Defendant.**

**No. 84 CIV 6462 (LBS).**

**United States District Court,  
S.D. New York.**

**Jan. 29, 1988.**

**Connell, Foley & Geiser, Roseland, N.J., for plaintiff;  
Theodore W. Geiser, of counsel.**

**Peter L. Zimroth, Corp. Counsel for the City of N.Y., New  
York City, for defendant; Doron Gopstein, Jonathan Pines, Tai  
Park, of counsel.**

**OPINION**

**SAND, District Judge.**

In this suit under 42 U.S.C. § 1983 against now-deceased Bronx District Attorney Mario Merola, individually and in his official capacity, the Defendant's representative has moved to dismiss. Plaintiff is Schiavone Construction Co., which was indicted in 1984 along with then-United States Secretary of Labor Raymond Donovan (a major stockholder in the company) on charges involving participation in organized crime. Schiavone and some of its employees were tried on these charges in 1986-87, and were acquitted.

Plaintiff's complaint asserts claims for violations of the Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution. At oral argument, Plaintiff advised the Court that all claims other than the Fifth, Sixth, and Fourteenth

Amendment claims have been dropped. Furthermore, at oral argument Plaintiff chose to press only the issue of the violation of Plaintiff's right to a fair trial, arguing a due process violation only insofar as it related to "the interference with the fair trial," and specifically declining to argue any liberty violation. (See Transcript, Nov. 19, 1987, at 8.)

In essence, Plaintiff claims that it was denied due process and a fair trial in that District Attorney Merola, on several occasions prior to the trial, in bad faith, made false and inflammatory statements to the press about Schiavone Construction Co. and some of its employees. (No claim based on defamation, however, is asserted.) These statements allegedly made it appear that Schiavone and/or its employees were involved in organized crime, and referred to crimes for which the company was not in fact under indictment or investigation. The statements were published in *The Daily News Magazine* [New York] and on the nationally televised news program "60 Minutes," *inter alia*.

A state prosecutor is protected by absolute immunity from liability under 42 U.S.C. § 1983 for activities "intimately associated with the judicial phase of the criminal process," such as the initiation of a prosecution and the presentation of the state's case. *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). Where a prosecutor acts in an investigative or administrative capacity, as in the dissemination of information to the press, he is protected only by a qualified "good faith" immunity. *Powers v. Coe* (*Powers I*), 728 F.2d 97, 103 (2d Cir.1984); *Taylor v. Kavanagh*, 640 F.2d 450, 452-53 (2d Cir.1981).

We agree with Plaintiff that the qualified immunity of the Defendant here does not provide a basis for dismissal of the complaint. "If the immunity [to suit under § 1983] is qualified, not absolute, the scope of that immunity will necessarily be related to facts not yet established either by affidavits, admissions, or a trial record." *Scheuer v. Rhodes*, 416 U.S. 232, 242-43, 94 S.Ct. 1683, 1689-90, 40 L.Ed.2d 90 (1974).

However, to sustain a 1983 action for deprivation of a fair trial because of prejudicial pre-trial publicity, a plaintiff must show: 1) that there were improper leaks, 2) that there was deprivation of a fair trial, and 3) that "other remedies were not available or were used to no avail to alleviate the effects of the leaks, e.g., a thorough voir dire, utilization of challenges both peremptory and for cause, . . . a motion to change venue, and the like." *Powers v. Coe (Powers I)*, *supra*, 728 F.2d at 105. As discussed below, we find that the Plaintiff here cannot show deprivation of a fair trial, and so the motion to dismiss is granted.

Plaintiff Schiavone asks us to take a metaphysical view of the concept of "fair trial," which would begin with the commencement of any criminal investigation procedures against a defendant. Plaintiff asserts that it was deprived of due process and a fair trial by virtue of the prejudicial pre-trial statements by District Attorney Merola, and that it should be recompensed for monetary expenses specifically attributable to the attempt to neutralize his comments and to prevent the tainting of the jury pool. It seeks compensatory and punitive damages based upon allegations that, in order to counteract the effects of the prejudicial publicity, it was forced to hire a public relations firm and to engage in a more extensive voir dire and a more intricate trial strategy than would otherwise have been required.

Even if we take such an expansive view of "fair trial," we are unable to find any constitutional violation here. As to whether the Plaintiff was accorded due process of law in its efforts to obtain a fair trial, the allegations do not suggest any procedural deficit other than the publication of prejudicial pre-trial information by the District Attorney. While we consider behavior such as that alleged here (if proven) to be highly reprehensible, we also recognize that safeguards exist to protect against the effects of potentially prejudicial publicity. The law has foreseen that the minds of all potential jurors may not be clean slates as to the charges against a criminal defendant, and for this reason it provides such remedies as voir dire, peremptory challenges and challenges for cause, and change of venue. See *Irvin v. Dowd*, 336 U.S. 717, 722-23, 81 S.Ct.

1639, 1642-43, 6 L.Ed.2d 751 (1961); *Powers v. McGuigan* (*Powers II*), 769 F.2d 72, 76 (2d Cir.1985). The Plaintiff does not allege that it attempted to use such remedies and was prevented from doing so, or that these remedies were futile as a means of providing an impartial jury (as defined below) in its case. Rather it attempts to claim that such remedies are inherently unavailing to purge the process of malfunctions that may occur along the way. This is simply not the law.

As to the issue of whether the trial itself was fair, we agree with Judge Dalton of the Western District of Virginia that no denial of a fair trial can be shown where the plaintiff was acquitted of the crime charged. *Kipps v. Ewell*, 391 F.Supp. 1285, 1290 (W.D.Va.1975) (improper police conduct involving prejudicial pre-trial publicity did not result in denial of fair trial where defendant was acquitted), *aff'd*, 538 F.2d 564 (4th Cir.1976).<sup>1</sup> "The relevant question is . . . whether the jurors at [the] trial had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 2891 81 L.Ed.2d 847 (1984). The right to a fair trial, in the context of prejudicial pre-trial publicity and the potential tainting of the jury pool, is satisfied where, by means of change of venue, voir dire, lapse of time between the publicity and the trial, and/or other factors, an impartial jury has been selected.<sup>2</sup> We find that the constitutional standard, which posits "that a juror is impartial only if he can lay aside his opinion and render a verdict based on the evidence" (*id.* at 1037 n. 12), is by definition met where the jurors have

<sup>1</sup> See also *Sears v. City of Chicago*, No. 84 C 3678, slip op. (N.D.Ill., E.D., April 28, 1986) ("As [Plaintiff] was acquitted at trial, his right to a fair trial obviously was not compromised under [the] standard [for ineffective assistance of counsel].").

<sup>2</sup> See, e.g., *Rosenberg v. Martin*, 478 F.2d 520, 525-26 (2d Cir.) (In a § 1983 action against a police officer alleged to have made multiple false and prejudicial statements to influence public opinion against a criminal defendant, the lapse of time between the publicity and the trial, and an effective voir dire of the jury panel, resulted in a fair trial even where the criminal defendant was convicted.), *cert. denied*, 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90 (1973).

acquitted the defendant.<sup>3</sup> (This must necessarily be true unless the pre-acquired opinion was that the defendant was innocent, in which case there was still no violation of the defendant's constitutional rights.)

Although it may cost more to achieve the goal of obtaining an impartial jury where there was prejudicial pre-trial publicity (e.g., costs associated with change of venue, extra litigation time spent on voir dire, or even the employment of public relations expertise), if the result was indeed an impartial jury, we can find no violation of the right to a fair trial and therefore no federal constitutional basis for the recovery of the added costs.

We note Judge Lumbard's concurrence in *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir.1976), which states that "improper pre-trial publicity [by a prosecutor] endanger[s] a fair trial and may constitute a denial of due process," and suggests that the "extra burden" of the expense of remedial actions such as change of venue should be recoverable in federal court in a suit under § 1983. We believe, however, that the Second Circuit, speaking more recently on the issue in *Powers v. Coe (Powers I)*, *supra*, 728 F.2d 97, requires, both for fair trial and for due process claims, that the pleadings allege facts that would actually constitute the denial of a fair trial (and also that they allege that specific remedies were attempted and were unavailing). In the absence of controlling precedent to the contrary, we find that there was no violation of due process where the defendant was allowed to and did take actions ensuring that a fair trial ensued.

What the Plaintiff is seeking here is a prophylactic rule that will prevent the sort of trial in the media prior to trial in court that Plaintiff alleges here. While we, too, believe the conduct alleged here (if proven) to be harmful to the criminal justice

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<sup>3</sup> Cf. *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.) (The claim that defendants were denied a fair trial in that the district judge was biased against a certain defense attorney was "belied by the fact that the defendant represented by that lawyer was acquitted."), *cert. denied sub nom. Baraldini v. United States*, 474 U.S. 841, 106 S.Ct. 124, 88 L.Ed.2d 102, *Odinga v. United States*, 474 U.S. 841, 106 S.Ct. 125, 88 L.Ed.2d 102, and *Ferguson v. United States*, 474 U.S. 1032, 106 S.Ct. 592, 88 L.Ed.2d 572 (1985).

system as a whole, we feel that existing sanctions, if properly invoked and effectuated, should be a sufficient deterrent to inflammatory prosecutorial rhetoric. It is fundamental that, in order to recover damages in a § 1983 action, a plaintiff must show a deprivation of a constitutional right. *Rosenberg v. Martin*, 478 F.2d 520, 524 (2d Cir.), *cert. denied*, 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90 (1973); *cf. Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (injury to reputation alone is not cognizable under the United States Constitution, and cannot support a claim under 42 U.S.C. § 1983). We find no constitutional violation here, and therefore the motion to dismiss is granted.

SO ORDERED.

James MARTIN et al., Plaintiffs-Appellants,

v.

Mario MEROLA, District Attorney, Bronx County, et al.,  
Defendants-Appellees.

No. 1024, Docket 75-7113.

United States Court of Appeals, Second Circuit.

Argued June 19, 1975.

Decided Feb. 5, 1976.

Henry B. Rothblatt, New York City (Rothblatt, Rothblatt, Seijas & Peskin and Andrew P. Zweben, New York City, on the brief), for appellants.

Robert M. Cohen, Asst. Dist. Atty., New York City (Mario Merola, Dist. Atty., Bronx County, New York City, on the brief), for appellees.

Before LUMBARD, GIBBONS,\* and GURFEIN, Circuit Judges.

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\* United States Circuit Judge for the Third Circuit, sitting by designation.

## PER CURIAM:

This appeal raises important questions as to the scope of a prosecutor's immunity to suit. The six plaintiffs, all of whom were indicted in Bronx County in August 1974, on one or more felony charges arising out of an alleged loan-sharking operation,<sup>1</sup> instituted this damage action under 42 U.S.C. § 1983 alleging, inter alia, that their constitutionally guaranteed right to a fair trial had been infringed by the action of the defendants, Mario Merola, District Attorney of Bronx County, and two of his assistants, in announcing to the press the arrest of the plaintiffs and asserting that they were "linked directly to Mafia Crime Families," and "vultures" . . . "tied . . . strongly . . . with Tramunti Crime Families." Plaintiffs appeal from a January 23, 1975 order of the Southern District granting defendants' motion for summary judgment.<sup>2</sup>

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<sup>1</sup> Carmine Apuzzo was indicted, with three others on July 19, 1974, for third degree conspiracy and criminal usury.

James Darienzo, a/k/a James Martin, Angelo Leonardi, and Carmine Lavia were indicted, also on July 19, for fourth degree conspiracy and tampering with a witness.

James Darienzo (James Martin) was further indicted on July 31 for felonious possession of a weapon.

James Darienzo (James Martin), Angelo Leonardi, Ronald Darienzo, Bruce Doak, Carmine Lavia, and one other, were indicted on August 2 for third degree conspiracy and thirteen counts of criminal usury.

<sup>2</sup> The district court's summary judgment decision was restricted to defendants Merola, Darcy and Chester, all prosecutors in Bronx County. It did not affect plaintiff's action against six police officers, also named as defendants in the complaint. On January 23, 1975, Judge Brieant granted, without prejudice, a motion to dismiss filed by the police officer defendants for failure of the complaint

to set forth separately and with sufficient specificity to permit an informed responsive pleading, the facts relied on to show personal involvement by each defendant, stated separately, in order that the Court may ascertain what each such defendant did, and whether or not such conduct was within the limited immunity available to these movants.

Plaintiffs have since filed an amended complaint.

Each of the six plaintiffs was arrested on August 7, 1974, after warrants had issued on the sealed indictments returned by the Bronx County grand jury in July and August, 1974. Their complaint sets out in considerable detail the circumstances of the arrest and confinement of Carmine Apuzzo and Angelo Leonardi, alleged to be oppressive in view of police knowledge that each of these individuals suffered from serious and debilitating diseases.<sup>3</sup> We find it unnecessary to deal with these allegations in the absence of any indication that the three appellees were personally involved in the conduct complained of.<sup>4</sup> *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

Appellants, however, further assert that appellees issued press releases to various news media regarding plaintiffs' arrest — a fact not denied by the appellees — and that these press releases violated appellants' 4th, 5th, 6th, 8th, 13th, and 14th Amendment rights. Newspaper clippings, annexed to an affidavit submitted by plaintiffs' counsel in response to defendants' motion for summary judgment, reveal the tenor of the news stories engendered by the district attorney's remarks. On August 9, 1974, the New York Times reported that:

Mr. Merola said yesterday that the operation's ringleader was James Darienzo, 64 years old, of 2720 Seymour Ave., the Bronx. The District Attorney said he was "strongly connected with the Tramunti crime family."

Another man indicted, Carmine Lavia, 43, of 2231 Treman Avenue, the Bronx, was said by Mr. Merola to be tied to the reputed crime family of Joseph S. Columbo, Sr.

The New York Post article included Merola's characterization of appellants as "vultures" and his comment that "[m]embers of this ring have been linked directly to the Tramunti and Columbo crime families." Similar accounts appeared in the New York Daily

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<sup>3</sup> Apuzzo suffered from diabetes and terminal cancer. He has since died. Leonardi had undergone open heart surgery nine months prior to his arrest.

<sup>4</sup> See note 2, *supra*.

News and the Times Herald Record. Judge Brieant described these stories as "of a somewhat lurid and sensational nature."

In granting appellees' motion for summary judgment, Judge Brieant held that the doctrine of prosecutorial immunity barred the appellants from vindicating any possible violation of fair trial rights resulting from the alleged acts of the prosecutors. While recognizing that disclosure of the plaintiffs' purported criminal affiliations with "crime families" was arguably a failure to comply with the Fair Trial and Free Press Criminal Justice Standards of the American Bar Association,<sup>5</sup> and that it may have been a breach of the Code of Professional Responsibility adopted by the New York State Bar Association,<sup>6</sup> he concluded that such a "breach of prosecutorial responsibility does not amount to a deprivation of . . . rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. 1983." Judge Brieant added: "Apart from the right of the public to know, it would seem that the prosecutor should enjoy some right of free speech so as to permit him to account through the media to the voting public for his stewardship of his important public trust."

In view of our disposition of the appeal which results in a dismissal of the action without prejudice, we need not consider whether such a complaint, if and when it is again filed after the termination of the criminal proceedings, would state a claim for relief. Indeed, the dismissal of the complaint deprives the district court and this court of jurisdiction since there is no longer a pending case or controversy for the district court to manage. *Hawkins v. Town of Shaw*, 461 F.2d 1171, 1173 (5th Cir. 1972) (en banc).

Until the state prosecutions have been concluded, it is simply impossible to make any reasoned evaluation of plaintiffs' claim that they have been deprived of the opportunity to secure a fair

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<sup>5</sup> The ABA Standards Relating to the Administration of Criminal Justice, Fair Trial and Free Press, Part II, § 2.1(1), proscribe the release by law enforcement officers, of information relating to a defendant's prior criminal record, character or reputation.

<sup>6</sup> Judiciary Law, McKinney's Supp. 1975.

trial by reason of the defendants' actions. Such a claim requires more than the mere speculation of damages contained in plaintiffs' complaint; it requires showing that plaintiffs have in fact been denied their due process rights. *Rosenberg v. Martin*, 478 F.2d 520, 525 (2d Cir.) cert. denied, 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90 (1973). We do not know, nor can the parties now illuminate, whether an impartial jury may be selected. Cf. *Tunnell v. Wiley*, 514 F.2d 971 (3d Cir. 1975). Similarly, we can only guess as to the desirability of a change in venue or the feasibility of a continuance.

Moreover, even if such determinations were possible, it would offend the principle of comity for a federal district court to inquire into plaintiffs' ability to secure a fair trial in a pending state prosecution. See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). That appellants herein have requested such an inquiry in the context of an action for damages rather than a suit directly to enjoin a state criminal proceeding is not determinative. See *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974). In implementing the policy of non-interference, federal courts must focus upon the practical impact of any potential ruling. See *Samuels v. Mackell*, 401 U.S. 66, 73, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). In addition, such parallel proceedings represent a drain on already overextended judicial and prosecutorial resources.

Accordingly, we agree that plaintiffs' complaint must be dismissed on the basis that it is now premature. We do so without prejudice to its renewal at the conclusion of state criminal proceedings when the district court will be better able to assess the merits of plaintiffs' claims.<sup>7</sup>

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<sup>7</sup> We note that, in the absence of any federal statute of limitations, § 1983 actions brought in New York State are governed by the three year period provided in CPLR § 214 for suits based on a statute. *Swan v. Board of Education*, 319 F.2d 56, 59 (2d Cir. 1963); *Romer v. Leary*, 425 F.2d 186 (2d Cir. 1970). The question of when a claim for relief accrues, however, remains one of federal law. *Kaiser v. Cahn*, 510 F.2d 282, 285 (2d Cir. 1974). As a corollary to today's decision that plaintiffs' complaint is presently premature, we hold that the statute of limitations should not begin to run until the completion of their criminal trial. In this manner, plaintiffs' claim that they have been deprived of the opportunity to secure a fair trial will be preserved until such time as the extent of their injury, if any, is capable of determination. *Id.*

Vacated and remanded to the district court with directions to dismiss the complaint without prejudice.

LUMBARD, Circuit Judge (concurring):

The question of prosecutorial immunity from accountability for public statements prejudicial to a defendant's right to a fair trial is one of such importance, and of such novelty in this circuit, that Judge Gibbons and I have felt that the action of the panel should, if possible, be unanimous. This is especially desirable where only one member of the panel is an active circuit judge of this circuit.

The per curiam opinion speaks for all three of us in vacating the district court order and directing a dismissal of the complaint without prejudice to renewal after the state court criminal proceedings have been terminated. The per curiam leaves open for decision at such later time the question whether the complaint sets forth a cause of action under § 1983. Judge Gibbons and I believe that there are good reasons why a federal appellate court should express an opinion on this question at this time. We take this occasion to state the reasons why such a complaint should stand when brought after the conclusion of the state court proceedings.

It is, of course, well settled that a prosecutor is "clothed with judicial immunity" from suit for actions taken in his official capacity, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1871); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950); *Scolnick v. Lefkowitz*, 329 F.2d 716 (2d Cir.), *cert. denied*, 379 U.S. 825, 85 S.Ct. 49, 13 L.Ed.2d 35 (1964), including civil suits for money damages brought under the Civil Rights Act. See *Palermo v. Rockefeller*, 323 F.Supp. 478, 485 (S.D.N.Y.1971). This immunity does not, however, protect the prosecutor against responsibility for his acts when they are clearly beyond the proper exercise of his authority and exceed any possible construction of the power granted to his office, *Gregoire v. Biddle*, *supra*, at 581. See also, *Robichaud*

*v. Ronan*, 351 F.2d 533 (9th Cir. 1965); *Lewis v. Brautigan*, 227 F.2d 124 (5th Cir. 1955); *Guerro v. Mulhearn*, 498 F.2d 1249 (1st Cir. 1974).

Taking the plaintiffs' allegations as true, as we must for purposes of evaluating their claims, we can see no reasonable need or excuse for issuing statements to the news media regarding any supposed connection of the plaintiffs with any "crime family" or "Mafia." It could in no way be relevant to the crimes charged against these plaintiffs by the Bronx County grand jury. Indeed, any such allegations made at trial of those indictments by the prosecutor would, in most circumstances, require reversal of any conviction.

It is, as Judge Brieant noted below, both the right and the duty of the prosecutor to advise the public, through the news media, of action taken by the grand jury, the names of those accused and the fact that they have been arrested. But, to go beyond this and allege that indicted persons are members of a "crime family" is tantamount to leading the public to believe the false and impermissible syllogism that because of the plaintiffs' purported membership in a criminal organization they therefore committed the crime for which they are presently charged. While any criminal affiliations of the plaintiffs may become relevant to their sentencing if and when they are convicted at trial, at the time of the press conferences held by the appellees, these plaintiffs were innocent in the eyes of the law. As Mr. Justice Frankfurter recognized long ago, he who occupies the prosecutorial office and "wields the instruments of justice wields the most terrible instruments of government."<sup>1</sup> It was the plaintiffs' constitutional right to have the prosecutor refrain from making any statements not relevant to their indictment and arrest which might prejudice their obtaining a fair trial.

Of course, the improper statements of the prosecutor do not necessarily render impossible the selection of an impartial jury; yet, they should not be excused solely on the ground that it

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<sup>1</sup> Letter to the New York Times, March 4, 1941.

may be possible to secure a fair trial by a change of venue or the grant of a continuance, or both. Such measures are merely necessary compromises with due process, such as the Sixth Amendment right to be tried in the vicinage where the alleged offense has been committed and the right to a speedy trial. Moreover, such remedies for prejudicial public statements place an extra burden on those charged with crime and an additional expense for counsel, travel and delay. To the extent that such expenses may be incurred by a criminal defendant in protecting against what a court determines to have been an infringement of his rights, we believe they should be recoverable in federal court in a suit under § 1983.

It is true that many of the earlier cases have seemed to say that the prosecutor's immunity is virtually absolute and that he may speak with impunity about an indicted defendant. Doubtless it is true that all too many prosecutors have acted on that assumption in times past. But at least by 1966 it had come to be recognized that improper pre-trial publicity endanger a fair trial and may constitute a denial of due process. In *Shepard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 60 (1966), decided in June of that year, Mr. Justice Clark noted in reversing a murder conviction that,

unfair and prejudicial news comment on pending trials has become increasingly prevalent . . . Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused. . . . Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U.S. at 362-63, 86 S.Ct. at 1522.

In December 1966, the ABA Criminal Justice Standards on Fair Trial and Free Press, referred to by Judge Brieant, were promulgated and published.<sup>2</sup> See also, ABA Standards Relating

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<sup>2</sup> These Standards were adopted by the ABA House of Delegates in February 1968.

to the Prosecution Function and the Defense Function, Part I, § 1.3, Comment, formulated by an Advisory Committee whose chairman was Warren E. Burger, then United States Circuit Judge. Shortly thereafter, in 1969, the ABA adopted the Code of Professional Responsibility.<sup>3</sup> Disciplinary Rule 7-107, included therein, precludes an attorney, from the time of filing of an indictment or issuance of an arrest warrant, from making any extrajudicial statements whose public dissemination is reasonably foreseeable and which relates to "the character, reputation or prior criminal record . . . of the accused." In accord, Report of the Commission on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391.

Whatever the law may have been prior to 1966, we are convinced that the shield of absolute immunity is today unavailable to a public prosecutor who acts beyond the scope of his official duties, *Gregoire v. Biddle*, supra at 581, and who knows or reasonably should know that his actions will deprive a criminal defendant of his constitutionally protected liberties, cf. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1348 (2d Cir. 1972), on remand from the Supreme Court, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), and whose conduct would not be justified under any set of circumstances, facts or assumptions,<sup>4</sup> *Wade v. Bethesda Hospital*, 337 F.Supp. 671, 673

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<sup>3</sup> New York State adopted the Code of Professional Responsibility in 1970. Judiciary Law, McKinney's Supp.1975.

<sup>4</sup> It is upon this final prong that the conduct of Merola and his co-defendants, if proven at trial, stands on different footing than that of the prosecutors in *Gregoire v. Biddle*. In *Gregoire*, a complaint was filed against two successive Attorneys-General of the United States and various subordinate federal officials, alleging that they had arrested and detained the plaintiff on the pretense that he was a German, and thus an enemy alien, despite the earlier ruling of an administrative hearing board that he was a Frenchman. Judge Learned Hand, writing for the court, held that the acts of the defendants were entitled to absolute immunity because they were within the scope of their respective offices. Had the plaintiff been a German — an imaginable assumption —

(footnote continued)

(S.D. Ohio 1971). A § 1983 plaintiff should be allowed to prove his case when he alleges specific prosecutorial misdeeds which would permit either a court or jury to infer the existence of these necessary predicates to prosecutorial liability. We reach this conclusion in recognition of the above-recited evolution in the law and professional standards as well as in response to the need for a more positive means of compensating individuals for the deprivation of their civil rights.

In its most recent expression on the subject of official immunity, *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), the Supreme Court held that a school administrator forfeited his immunity and could be required to respond in damages to a § 1983 action if he "knew or reasonably should have known" that his conduct in expelling students violated their constitutional rights. See also *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). Here, we must assume from the pleadings that appellees knew, or as district attorneys should have known, that their statements to the press jeopardized appellants' right to a fair trial. While we do not suggest that *Wood* controls the instant case, it does epitomize a trend to hold public officials accountable for their infringement

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the defendants would have been fully authorized and justified in behaving as they did. In contrast, no set of facts or circumstances could possibly condone the pretrial release by a public prosecutor of the purported criminal affiliations of a criminal defendant. Such actions are beyond any reasonable construction of the proper exercise of the powers of the prosecutor's office.

The increasing concern with the possible damaging effects of prosecutorial statements which go beyond permissible limits is surely due in large part to the fact that today universal access to television cameras charges the memories of viewers more forcibly and indelibly than other means of mass communication. While there is no evidence of any television broadcast in this case, it is common knowledge that such matter is frequently broadcast on many stations.

In any event, we disagree with those who may argue that *Gregoire v. Biddle* is authority for dismissing with prejudice actions such as this, as we believe in view of the developments since 1949, set forth above, that *Gregoire v. Biddle* no longer is controlling authority.

of individual rights. See *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (Governor of Ohio and other state executive officials would be liable for damages in a § 1983 action if they acted in bad faith in ordering the National Guard to quell a student disturbance on a university campus, resulting in the death of three demonstrators).

In order to go forward with such a suit, however, the allegations should be specific as to what the prosecutor did so that it will be apparent from the face of the complaint that the actions complained of were improper and the injury suffered was of constitutional proportion.<sup>5</sup> The courts must guard against the initiation and prolongation of any litigation against prosecutors which might seriously hamper their effectiveness and delay the performance of their official duties.

It should not be enough, therefore, in § 1983 suits against prosecutors to make only general charges with no specifications such as might be sufficient under Rule 8 of the Federal Rules of Civil Procedure. *Fine v. City of New York*, 529 F.2d 70 (2d Cir. 1975); *Esser v. Weller*, 467 F.2d 949 (3d Cir. 1972). In the instant case, any generality in the plaintiffs' complaint was rectified by counsel's affidavit which annexed the newspaper clippings referred to in the court's opinion and the absence of any denial or explanation by the defendants.

We also note that it is nowhere alleged that the statements of the prosecutors regarding the connection of the plaintiffs with "crime families" are untrue. It is now enough to observe that truth should not be a defense to this cause of action, although, conceivably, it may later become relevant in mitigation of damages.

We believe the time has come for prosecutors to realize that failure to conduct themselves within the law and in accordance with the constitutional rights of those accused of crime, and held

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<sup>5</sup> Appellants have, at all times, been represented by counsel. The pleading requirements are considerably more relaxed for plaintiffs proceeding pro se. *Williams v. Vincent*, 508 F.2d 541, 543 (2d Cir. 1974).

to be innocent until proven guilty, may subject them to suit in a federal court for the damages caused by their disregard of the law.

Judge GIBBONS concurs in this opinion.

GURFEIN, Circuit Judge (separate statement):

I am happy that the *per curiam* opinion ordering that the complaint be dismissed without prejudice under the comity doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), is unanimous. I am unhappy that I cannot join in the excellent homily of my colleagues on prosecutorial verbosity and its dangers. My reason is simple. In state-federal comity situations we abstain in large part because we do not wish to prejudice the merits in the state court. To abstain and to decide the merits at the same time may breed mischief.

Hence, while my brother lumbard's zeal to right the wrongs of prosecutorial excess is entirely commendable and while I have watched with admiration for many years his dedicated service in the formulation of the ABA Standards Relating to the Prosecution Function and the Defense Function, I cannot agree that this is the time or place for an advisory opinion. Our refusal to affirm the dismissal on the merits should itself serve as a sufficient warning to prosecutors to be more circumspect in their public statements—indeed a worthy goal.

It is not desirable to decide a case before it is even brought. Having dismissed the complaint as premature, that is just the position we are in. We do not know what the new complaint will allege nor do we know whether damage will be shown. The factual averments in a future complaint may be quite different and will surely involve supervening circumstances, including whether "the improper conduct in fact had [the] result" of violating the plaintiffs' Sixth and Fourteenth Amendment rights to their damage. See *Rosenberg v. Martin*, 478 F.2d 520, 525 (2 Cir.), *cert. denied*, 414 U.S. 872, 94 S.Ct. 102, 38 L.Ed.2d 90 (1973).

Having said that we should not say anything on the merits, I am myself somewhat in a dilemma. I can only work myself out of the dilemma by suggesting a series of questions to be strewn like broken glass on an otherwise seemingly smooth path.

Some of the more apparent questions are: (1) In the delicate area of prosecutorial immunity, will the wisdom of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579 (2 Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950), survive, or will *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975), and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), equally wise, be relevant to limit quasi-judicial *prosecutorial* immunity in civil rights "speech" cases? Is there really a discernible trend? (2) Since a private person may be a co-conspirator with a public official in violation of civil rights, see *Birnbaum v. Trussell*, 371 F.2d 672, 676 (2 Cir. 1966), will the newspapers which published the statements of the District Attorney be equally liable? What are the First Amendment implications? (3) If the unwarranted statement of a prosecutor subjects him to money damages on the ground that he has impaired the defendant's right to a fair trial *per se*, what shall we say when the defendant urges the same statement by the prosecutor as a *per se* ground for reversal or habeas corpus relief if he is convicted? Cf. *United States v. Pfingst*, 477 F.2d 177, 185 (2 Cir. 1973). Do we abandon the "totality of circumstances" test? See *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 60 (1966). (4) If the prosecutor makes the same outrageous statement in court on an arraignment, will he still be immune from suit like the judge? Or are we crossing new frontiers?

My only contribution to the discussion may be respectfully to suggest that there are no easy answers. I do not imply that my brothers think that the answers are easy, but in my view, our judicial history does not permit us to answer the hard ones until the time comes when we have no other principled choice.